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IN THE

Supreme Court of the United States

No. 431. October Term, 1934.

PENN GENERAL CASUALTY COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, Ex Rel.,
WM. A. SCHNADER, Attorney General.

On Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR PETITIONER.

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PENN GENERAL CASUALTY COMPANY,
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v.

COMMONWEALTH OF PENNSYLVANIA Ex Rel. WM. A. SCHNADER, ATTORNEY GENERAL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR PETITIONER.

This case comes before the Court on Writ of Certiorari issued to review a final decree of the Supreme Court of Pennsylvania, the highest Court of said State.

OPINIONS BELOW.

On March 14, 1934, an opinion was filed by the trial judge, Watson R. Davison. (R. 15.) It has not been reported.

The opinion of the Supreme Court of Pennsylvania was written by Justice Schaffer; Chief Justice Frazer, Justices Simpson, Kephart, Maxey, Drew and Linn, concurring.

It was filed on June 30, 1934. (R. 26.) It is reported in 316 Pa. 1.

STATUTES INVOLVED.

The federal statute involved in this proceeding and referred to in the courts below is set forth in Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091 [28 U. S. C. A. § 41 (1)] and is, as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and . . . is between citizens of different states."

The statutes of the Commonwealth of Pennsylvania, which are involved in this proceeding and were referred to in the courts below, are set forth in "The Insurance Department Act of 1921," approved May 17, 1921, P. L. 789 (40 P. S. § 1, et seq.) and "The Insurance Company Law of 1921," approved May 17, 1921, P. L. 682 (40 P. S. § 341, et seq.). The material and relevant portions of said Insurance Department Act of 1921 are as follows:

> "Section 502. *Applications to Court to Take Over Business of Companies, Et Cetera, for Protection of Policyholders, Creditors, Et Cetera.*—Whenever any domestic insurance company . . . (a) is insolvent; or . . . (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; . . . the Insurance Commissioner shall communicate the facts to the Attorney General, who shall, after hearing, apply to the court of common pleas of Dauphin County . . . for an order directing such company, to show cause why its business should

not be closed, and the Insurance Commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require." (40 P. S. § 202.)

"Section 505. *Injunction; Return of Order to Show Cause and Decrees Thereon.*—On such application, or at any time thereafter, such court may, in its discretion, issue an injunction restraining such company . . . from the transaction of its business or disposition of its property until the further order of the court. . . ." (40 P. S. § 205.)

"Section 506. *Orders for Liquidation of Affairs of Companies, Et Cetera; Insurance Commissioner To Act as Receiver.*—If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company . . . such liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title to all of the property, contracts, and rights of action of such company . . . as of the date of the order so directing him to liquidate. . . ." (40 P. S. § 206.)

"Section 507. *Insurance Commissioner to Supersede Other Receivers.*—Whenever a receiver of an insurance company . . . is appointed by any court of this Commonwealth, on motion of the Attorney General at the instance of the Insurance Commissioner, such receiver shall forthwith supersede any receiver previously appointed by the decree of any court of this Commonwealth, and shall likewise supersede any assignee or trustee previously appointed by such insurance company. . . ." (40 P. S. § 207.)

"Section 508. *Superseded Receivers, Et Cetera, To Deliver Over Property and File Accounts.*—Such

superseded receiver, assignee, or trustee shall forthwith pay over and deliver all moneys, securities, assets, and property of such insurance company . . . in his or their custody, possession, or control to the receiver appointed as aforesaid on motion of the Attorney General, and shall likewise file his or their account in the court having jurisdiction of such superseded receiver, assignee, or trustee, which court shall allow credit for compensative counsel fees and expenses and for disbursements which shall have been properly earned, incurred, or made, prior to the appointment of the receiver made on motion of the Attorney General as aforesaid." (40 P. S. § 208.)

JURISDICTION.

The final decree of the Supreme Court of Pennsylvania was entered on June 30, 1934. (R. 34.)

The re-argument was refused on September 10, 1934. (R. 39.)

The jurisdiction of this Court is provided by Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937 [28 U. S. C. A. § 344 (b)].

At the trial it was urged that the state court was without jurisdiction to enter a decree since the United States District Court for the Eastern District of Pennsylvania had already acquired jurisdiction of the liquidation and winding up of the petitioner. (R. 23.) The trial court held the said federal court did not have the jurisdiction which it had assumed. (R. 24.)

On appeal, the Supreme Court of Pennsylvania affirmed the decree of the trial court, holding that Section 24 of the Judicial Code did not confer upon the federal court the jurisdiction which it had exercised. (R. 34.)

The decision of the Supreme Court of Pennsylvania which involves the construction and application of Section 24 of the Judicial Code, presents a federal question reviewable by this Court, *Longest v. Langford,* 274 U. S. 499 (1927).

STATEMENT OF FACTS.

On November 17, 1933, one Samuel Lando, a resident of Wheeling, West Virginia, and a shareholder of the petitioner, filed a bill in equity against the petitioner, a Pennsylvania corporation, in the United States District Court for the Eastern District of Pennsylvania, praying for the appointment of a receiver of the petitioner. (R. 6.)

On November 22, 1933, said bill and citation were duly served on the petitioner. (R. 6.)

On December 8, 1933, the Attorney General of the Commonwealth of Pennsylvania, filed in the Court of Common Pleas of Dauphin County of said state a suggestion and a rule to show cause why the petitioner should not be dissolved, its charter vacated and its affairs liquidated by the Insurance Commissioner. (R. 8.)

On December 11, 1933, said suggestion and rule to show cause were duly served on the petitioner. (R. 9.)

The averments in support of both said bill and said suggestion were substantially the same, to wit, that the affairs of the petitioner had been mismanaged and some of its assets misappropriated by some of its officers, resulting in its unsafe and unsound condition. (R. 7, 8.) Answers were filed by the petitioner to both said bill and said suggestion, admitting various acts of mismanagement and misappropriation, but denying insolvency and the unsafe and unsound condition of the petitioner. (R. 9, 12.) Said answer to the suggestion further averred the pendency

of the aforesaid bill in equity against the petitioner in the federal court. (R. 12.)

On December 14, 1933, the said Court of Common Pleas issued a restraining order on the petitioner, restraining it from further conduct of business and from disposing of or in any way dealing with its property and assets. (R. 9.)

On December 15, 1933, a restraining order was issued by the said District Court restraining the petitioner and its officers from disposing of its assets, otherwise than in the usual course of business. (R. 11.)

On March 14, 1934, after a hearing, the said Court of Common Pleas entered its final decree to the effect that the petitioner was in an unsafe and unsound condition. By the terms of said decree the charter of the petitioner was vacated, and the Insurance Commissioner was appointed liquidator to liquidate its affairs. (R. 12.)

From said decree, an appeal was taken to the Supreme Court of Pennsylvania, in which appeal the petitioner assigned as error the entry of said decree after the federal court had first acquired jurisdiction of the liquidation and winding up of the petitioner. (R. 25.)

On June 30, 1934, the Supreme Court of Pennsylvania rendered and filed its decision affirming the decree of the court below and holding that the said district court, as a court of equity, did not have jurisdiction of a suit brought by a non-resident shareholder against an insurance corporation incorporated under the laws of Pennsylvania for the appointment of receivers to wind up and liquidate the affairs of said corporation. (R. 26, 34.)

SPECIFICATION OF ERRORS.

The Assignment of Error which the petitioner intends to urge is that the Supreme Court of Pennsylvania erred

in affirming the decree of the Court of Common Pleas of Dauphin County by which the charter of the petitioner was vacated and a liquidator was appointed to wind up its affairs. (R. 25, 34.)

QUESTIONS PRESENTED.

1. Does a federal court located in the state where an insurance company is incorporated have jurisdiction of a suit in equity instituted by a non-resident shareholder thereof alleging same to be insolvent and praying for the appointment of a receiver in order to enforce and adjust the rights and equities of the creditors and shareholders?

2. Can such jurisdiction be limited or impaired by state statutes which provide a system for the incorporation, regulation and liquidation of insurance companies?

3. Where a federal court has first acquired such jurisdiction and the proceedings therein are still pending, can a state court in a suit subsequently instituted appoint a receiver to wind up and liquidate the affairs of such insurance company?

ARGUMENT.

SUMMARY OF POINTS.

1. THE FEDERAL COURT HAS JURISDICTION OF A SUIT BY A NON-RESIDENT SHAREHOLDER AGAINST AN INSURANCE CORPORATION PRAYING FOR THE APPOINTMENT OF A RECEIVER IN ORDER TO ENFORCE AND ADJUST THE RIGHTS AND EQUITIES OF CREDITORS AND SHAREHOLDERS.

   (1) *Under its general equity jurisdiction, a federal court has the power to determine a corporation's solvency and to enforce and adjust the rights of creditors and shareholders thereof by the appointment of a receiver to wind up and liquidate the affairs of said corporation.*

   (2) *The equity jurisdiction of the federal courts is unlimited and applies to insurance companies even though state legislatures have provided complete systems for incorporation, supervision, and liquidation of such corporations.*

2. THE JURISDICTION OF THE STATE COURT OVER THE LIQUIDATION AND WINDING UP OF INSURANCE COMPANIES IS NOT EXCLUSIVE AND CANNOT EFFECT THE JURISDICTION OF THE FEDERAL COURT.

   (1) *The Insurance Code does not give exclusive jurisdiction to the state court.*

   (2) *The Insurance Code cannot limit or affect the jurisdiction of the federal court.*

3. THE JURISDICTION OF THE FEDERAL AND STATE COURTS BEING CONCURRENT, THE FEDERAL COURT FIRST ACQUIRED JURISDICTION AND IS THEREFORE ENTITLED TO RETAIN IT TO THE EXCLUSION OF THE STATE COURT.

(1) *The proceedings in the state court and in the federal court involve the same issues with regard to the same subject matter.*

(2) *The federal court first acquired jurisdiction, and is entitled to retain said jurisdiction to the exclusion of the state court.*

(3) *The jurisdiction of the federal court is unaffected by any proceedings by the Insurance Commissioner prior to the filing of the suggestion by the Attorney General, or by any subsequent proceedings in the state court.*

Point 1.

The federal court has jurisdiction of a suit by a non-resident shareholder against an insurance corporation praying for the appointment of a receiver in order to enforce and adjust the rights and equities of creditors and shareholders.

The jurisdiction of the federal courts is derived from Article III, Section 2, Clause 1 of the Constitution as follows:

> "The judicial Power shall extend . . . to Controversies . . . between citizens of different States . . . "

Section 1 of Article III of the Constitution provides, as follows:

> "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Pursuant to said section, Congress established the district courts and by Section 24 of the Judicial Code [28 U. S. C. A. § 41 (1)] has conferred upon them original jurisdiction . . .

> "First. Of all suits of a civil nature at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and . . . is between citizens of different states . . . ."

Thus the States, by adopting the Constitution, have surrendered and conferred upon the courts of the United States the unrestricted jurisdiction of suits in equity in cases of diversity of citizenship.

For many years it has been held that federal courts have jurisdiction generally to administer the affairs of

insolvent corporations at the suit of non-residents. This equitable relief has been granted generally without distinction as to the class or type of corporations involved.

(1) *Under its general equity jurisdiction, a federal court has the power to determine a corporation's solvency and to enforce and adjust the rights of creditors and shareholders thereof by the appointment of a receiver to wind up and liquidate the affairs of said corporation.*

In *Leadville Coal Co. v. McCreery,* 141 U. S. 475, 478 (1891), a receiver, appointed by the federal court, proceeded with the liquidation of the assets of the corporation for three years when he finally effected a sale of the corporation's property. An appeal was taken from the court's decree approving the sale. Pending the hearing of the appeal, the corporation was dissolved in the state court and another receiver was appointed for the corporation. The decree of the federal court was affirmed. On an appeal from the decree confirming the sale it was contended that the property should have been turned over to the state receiver and distributed by him. The decree of the circuit court was affirmed, this Court holding that the federal court "*having once acquired full jurisdiction and proceeded to a final determination, may rightfully proceed still further and to an execution of that decree, irrespective of any proceedings in the courts of the State.*" (Italics ours.)

In *Hollins v. Brierfield Coal & Iron Co.,* 150 U. S. 371 (1893), certain unsecured creditors filed a bill in equity asking for a receivership of the corporation's property. The corporation defended on the ground that the creditors were unsecured and the bill was properly dismissed for want of jurisdiction. The court, however, said on page 380:

> "Suppose the corporation and other defendants had made no defence, and, without expressly consenting, had made no objection to the appointment of a receiver, and the subsequent distribution of the assets of the corporation among its creditors; it cannot be doubted that a final decree providing for a settlement of the affairs of the corporation and a distribution among creditors could not have been challenged on the ground of a want of jurisdiction in the court, and that notwithstanding it appeared upon the face of the bill that the plaintiffs were simple contract creditors; because *the administration of the assets of an insolvent corporation is within the functions of a court of equity,* and the parties being before the court, it has power to proceed with such administration." (Italics ours.)

This principle has been affirmed in the recent cases of *United States v. Butterworth Corporation*, 269 U. S. 504 (1926), and *Shapiro v. Wilgus*, 287 U. S. 348 (1932). See also *Brown v. Lake Superior Iron Company*, 134 U. S. 530 (1890).

The jurisdiction of the federal courts to marshal and preserve the assets of a railway company by an equity receivership was recognized in *Metropolitan Railway Receivership*, 208 U. S. 90, 109 (1908).

In that case the court pointed out that the *jurisdiction of the federal courts was based on diversity of citizenship* and not on the fact that the railroad might or might not be engaged in interstate commerce.

As early as 1872, this Court recognized that the appointment of corporate receivers with enlarged powers to manage, liquidate and sell the corporate assets was a necessary incident in the court's dispensation of equitable relief. In *Davis v. Gray*, 16 Wall. 203, 219 (1872), Mr. Justice Swayne said:

"In the progress and growth of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred. In some of the States they are by statutes charged with the duty of settling the affairs of certain corporations when insolvent, and are authorized expressly to sue in their own names. It is not unusual for courts of equity to put them in charge of the railroads of companies which have fallen into financial embarrassment, and to require them to operate such roads, until the difficulties are removed, or such arrangements are made that the roads can be sold with the least sacrifice of the interests of those concerned. In all such cases the receiver is the right arm of the jurisdiction invoked. *As regards the statutes, we see no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation without its aid.*" (Italics ours.)

The jurisdictional right of federal courts to administer the property of insolvent corporations such as insurance companies, building and loan associations, public utilities, railroads and corporations generally through equity receiverships has been recognized for a long time by the Circuit Courts of Appeals and federal courts of first instance.

Centmont Corporation v. Marsch, 68 F. (2d) 460 (C. C. A. 1st 1933) (railroad) Certiorari denied, 291 U. S. 680 (1934);

Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721 (C. C. A. 2d 1912) (railroad) affirmed *In re Metropolitan Railway Receivership, supra;*

U. S. Shipbuilding Co. v. Conklin, 126 Fed. 132 (C. C. A. 3d 1903) (shipbuilding corpora-

tion); *O'Neil v. Welch*, 245 Fed. 261 (C. C. A. 3d 1917) (insurance company); *Scattergood v. American Pipe and Construction Co.*, 249 Fed. 23 (C. C. A. 3d 1918) (public utility corporation which supplied water to municialities);

Universal Savings & Trust Co. v. Stoneburner, 113 Fed. 251 (C. C. A. 4th 1902) (building and loan association);

Southern Trust Co. v. Austin, 30 F. (2d) 893, (C. C. A. 5th 1929) (land mortgage company and trust company). Certiorari denied, 279 U. S. 874 (1929);

Wilson v. Parvin, 119 Fed. 652 (C. C. A. 6th 1903) (building and loan association);

Havner v. Hegnes, 269 Fed. 537 (C. C. A. 8th 1920) (packing corporation);

Hardy v. North Butte Mining Co., 22 F. (2d) 62 (C. C. A. 9th 1927) (mining corporation);

Superior Oil Corporation v. Matlack, 47 F. (2d) 993 (C. C. A. 10th 1931) (oil corporation);

Towle v. American Bldg., Loan & Inv. Soc., 60 Fed. 131 (C. C. N. D. Ill. 1894) (building and loan association); *Morrill v. American Reserve Bond Co.*, 151 Fed. 305 (C. C. Mo. 1907) (bond investment company); *Alexander v. Southern Home Building & Loan Ass'n*, 110 Fed. 267 (C. C. N. D. Ga. 1900) (building and loan association); *Lewis v. American Naval Stores Co.*, 119 Fed. 391 (C. C. E. D. La. 1902) (general business corporation); *Solomons v. American B. & L. Ass'n*, 116 Fed. 676 (C. C. N. D. Ga.

1902) (building and loan association); *Flinn v. Interstate B. & L. Ass'n,* 141 Fed. 672 C. C. S. C. 1905) (building and loan association).

In *U. S. Shipbuilding Co. v. Conklin, supra,* the Court said (p. 136):

> "But *the bill of complaint* here does not rest upon the statute of New Jersey exclusively. It *sets forth a case cognizable by the court under its general equity powers. The bill not only alleges that the defendant corporation was insolvent, but,* as we have seen, it *charges that such insolvency was produced by the gross mismanagement of its directors;* and, furthermore, the bill charged the directors with positive misconduct involving breach of trust. Insolvency of a corporation, coupled with gross mismanagement of its affairs by its board of directors, and such misconduct of the directors as is here charged justify the appointment of a receiver by a court of equity independently of any statutory authority." (Italics ours.)

In *Towle v. American Bldg., Loan & Inv. Soc., supra,* the Court, after having appointed a receiver for the building and loan association, said (p. 132):

> "It is urged that this court had no jurisdiction to appoint the receiver—First, because the case made out by the bill and answer does not, within the rules of equitable jurisdiction as required and enforced in the Federal Courts, justify the appointment of a receiver; . . . I have no doubt that courts of equity have the ultimate power of administering the assets of insolvent corporations."

(2) *The equity jurisdiction of the federal courts is unlimited and applies to insurance companies even though state legislatures have provided complete systems for incorporation, supervision, and liquidation of such corporations.*

The opinion of the Supreme Court of Pennsylvania, as we understand it, in effect holds that the existence of state statutes governing the incorporation, regulation and liquidation of insurance corporations puts such corporations beyond the equity jurisdiction of federal courts at the suit of a non-resident shareholder.

The original grant of equity jurisdiction to the federal court in cases of diversity of citizenship is in the most general terms. It has not been restricted by Congress as to subject matter of litigation or parties. No distinction is made between real and artificial parties. The Judicial Code does not exempt from its jurisdiction particular kinds of corporations or particular kinds of businesses.

On the contrary, the decisions sustain the petitioner's contention that the federal court has jurisdiction in cases of diversity of citizenship regardless of the character of the defendant corporation or its business.

It has been held that the federal court has jurisdiction over an insurance corporation even though the state of its incorporation had enacted statutes providing for its incorporation, management and liquidation.

In *O'Neil v. Welch,* 245 Fed. 261, a shareholder's bill similar to the bill of Samuel Lando, in the instant case, was filed in the same federal court against the Union Casualty Insurance Company. The averments in both cases were substantially the same as was the relief prayed for.

That case was first decided by the district court under the title of *Welch v. Union Casualty Insurance Company,* 238 Fed. 968 (D. C. Pa. 1917). The district court held that it had jurisdiction to entertain the bill and to grant the relief sought. That conclusion was affirmed by the Circuit Court of Appeals which, however, reversed the lower court for the reason that proceedings were started in the state court a month before the bill in equity was filed in the federal court and that the state court, having first acquired jurisdiction, was entitled to retain it without interference from the federal court. In that case the court said (page 265):

> "The starting point in this controversy, therefore, is the jurisdiction of the two courts. *It cannot be doubted that the Federal Court, in the exercise of its general equity jurisdiction, has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency and distribute its assets, and that no State statute can impair or destroy that power."* (Italics ours.)

Mitchell v. Maurer, 69 F. (2d) 233 (C. C. A. 9th 1934) is another case which recognizes the power of the federal courts to liquidate and wind up insolvent and unsound insurance companies. In that case the defendant insurance company was declared insolvent in proceedings before the Court of Chancery of the State of Delaware. A bill in equity was filed in the federal court in California which bill as amended prayed for the appointment of ancillary receivers to liquidate such property of the insurance company as was within that jurisdiction. Within an hour thereafter, proceedings under the California insurance laws were instituted by the state insurance commissioner in the state court by which he sought to be placed in possession of the property and busi-

ness of the insurance company for the liquidation thereof under the state insurance laws similar to those involved in this proceeding. In that case the Circuit Court of Appeals likewise held that the federal court had concurrent jurisdiction over the liquidation and winding up of insolvent and unsound insurance companies and that, since the federal court first assumed jurisdiction, the lower court's denial of the insurance commissioner's motion to annul its order appointing ancillary receivers, should be affirmed.

In said case a writ of certiorari has been granted and argument already heard by this Court. (No. 54, October Term 1934.) The question under review, however, seems to have been restricted to whether the federal court in California had jurisdiction to appoint ancillary receivers merely upon application therefor by primary receivers appointed by the chancery court of the State of Delaware and not whether the federal court has jurisdiction to administer the affairs of a defunct insurance company.

Elson v. Mortgage B. & L. Association, 4 F. Supp. 779 (D. C. Pa. 1933), now on review by writ of certiorari granted by this Court, (No. 394, October Term 1934) concerns the administration of an insolvent and unsound building and loan association through the appointment of a receiver by the federal court.

The bill filed in the federal court in the *Elson* case so parallels that filed by Samuel Lando against the petitioner that a statement of its various allegations and prayers would practically be a repetition of the matters set forth in paragraph four of the Statement of the Case (R. 6).

In the *Elson* case Judge Welsh in deciding that the federal court had jurisdiction for the liquidation and winding up of quasi-public corporations, said: (p. 780)

"Have the federal courts jurisdiction to appoint receivers for building and loan associations? The appointment of receivers in equity in proper cases for corporations is but a branch of the equity jurisdiction of this court, and in absence of an act of Congress specifically exempting building and loan associations from such jurisdiction, it is hard to see upon what ground the assertion of lack of jurisdiction can logically rest. No extensive review of pertinent authorities should be necessary in view of the clear and convincing opinion of Judge Woolley of our Circuit Court of Appeals in the case of O'Neil v. Welch, 245 F. 261, 265 (C. C. A. 3 1917), where in setting aside the appointment of a receiver of an insurance company at the instance of the insurance commissioner of Pennsylvania, because the doctrine of comity required the federal courts to refuse to take jurisdiction after proceedings had first been begun in the state court, it was said:

" 'It cannot be doubted that the Federal court, in the exercise of its general equity jurisdiction, has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency and distribute its assets, and that no State statute can impair or destroy that power.' "

The decree in the *Elson* case was unanimously affirmed by the Circuit Court of Appeals for the Third Circuit in the case of *Commonwealth of Pennsylvania v. Williams, et al.*, 72 F. (2d) 509 (C. C. A. 3d 1934).

Judge Davis of that court considered the question whether "the jurisdiction of the Federal Court, conferred by Federal statutes in accordance with the power granted to Congress by the Constitution" is "ousted by the public policy of the Commonwealth". After a review of the federal cases on this question and a searching analysis of the cases relied upon by the Supreme Court in Pennsylvania in

deciding the instant case, Judge Davis concluded that the jurisdiction of the federal court was not affected or limited by any public policy of the Commonwealth. He said: (p. 516)

> "Congress has expressly conferred jurisdiction upon federal courts to appoint receivers in equity upon a stockholder's bill in such a case, and that power cannot be taken away by state Legislatures.
>
> "Further, we have not been referred to a single case, by very industrious and competent counsel, which holds that in a proper case a federal court sitting in equity is without power to appoint a receiver for a building and loan association. The Attorney General, able and brilliant, virtually admits that the District Court did have jurisdiction, but ought not to have exercised it, for he says: 'We are urging not that the District Court was technically without jurisdiction, but that it ought not to have exercised its jurisdiction.' "

The cases relied upon by the Supreme Court of Pennsylvania in holding that equitable jurisdiction to administer the property of an insolvent quasi-public corporation had been disclaimed by the federal appellate courts do not support that conclusion. (R. 39.)

An analysis of these cases will reveal that none of them is decisive of the question under consideration.

As stated by Judge Davis in *Commonwealth of Pennsylvania v. Williams, supra,* at page 516, after a separate discussion of each of the cases:

> "In not one of the federal cases cited or quoted in the Pennsylvania decision has the question in the case at bar, the jurisdiction of the federal court on a controversy involving quasi public corporations arising between citizens of different states, been in issue, and not a single court in those cases has pronounced upon it."

Port Newark Nat. Bank v. Waldron, 46 F. (2d) 296 (C. C. A. 3d 1930) did not concern a contest between two courts claiming concurrent jurisdiction, but between two branches of the federal government. In that case the Circuit Court of Appeals was merely considering the question of distribution of federal power, and held that, since the executive branch had already exercised "dominion" over the assets of the Bank through the Comptroller of the Currency prior to the filing of the bill, the federal court should have refused to exercise its jurisdiction.

Lyon v. McKeefrey, 171 Fed. 384 (C. C. A. 3d 1909) involved the receivership of a Pennsylvania banking corporation. Its assets exceeded its liabilities, but could not presently be converted into cash. A bill was filed in the federal court for the appointment of receivers, and the corporation filed its answer and joined in the prayer for such appointment "to the end that all the creditors of the respondent be paid in full, without loss and sacrifice of its assets, so as to preserve the same for its stockholders as well".

Receivers were appointed. The assets having then been liquidated and creditors paid, there remained a surplus. The Attorney General meanwhile proceeded in the state court under the statute regulating banking corporations and had the corporation dissolved and a receiver appointed to wind up its affairs. The federal court directed that the surplus be turned over to the state receiver, because the federal court had no authority to dissolve the corporation and the bill, which the Court would not allow to be amended, contained no prayer for distribution of surplus.

In that case Judge Gray said: (p. 391)

> "No question as to the right of the court below to take jurisdiction of the cause presented to it by the bill and answer filed October 23, 1907, is here raised. In their brief the counsel for the appellant say:

> " 'Our position is that for the purpose of this case we concede the jurisdiction of the circuit court and its receivers to administer this estate up until the time that all creditors had been paid in full and the rights of the complainants in the bill determined, and that the jurisdiction to this extent was not affected nor the proceedings abated by the subsequent dissolution of the corporation by the decree of the state court.' "

Consequently this case has no bearing on the question at issue.

In *Mitchell v. Lay,* 48 F. (2d) 79 (C. C. A. 9th 1931) the question before the Court was whether a federal court could take assets which a foreign insurance company had deposited with the Insurance Commissioner, pursuant to state statute, as somewhat in the nature of a qualifying bond for the foreign insurance company to do business in the State of California. In that case it was held that the federal court would not direct the insurance commissioner to apply such funds contrary to the terms of the statute under which they were held, and that the petitioner should first have exhausted her remedy against the particular fund before seeking equitable relief.

In *Lee v. Edmunds,* 66 F. (2d) 122 (C. C. A. 5th 1933) proceedings had been instituted in the state court several months prior to the time of filing petition in the federal court, and consequently the federal court was unable to exercise its jurisdiction.

In *Bank of Bay Biscayne v. Hankins,* 42 F. (2d) 209 (C. C. A. 5th 1930), the Court decided that the circumstances of the case did not warrant its intervention, but impliedly recognized that it had jurisdiction which it could exercise if it saw fit so to do. Furthermore, it appears from the facts, as set forth in the opinion, that the state court had taken possession of the bank prior to the institution of proceedings in the federal court.

We submit, therefore, that the foregoing cases are not authority for the proposition of the Supreme Court of Pennsylvania that federal courts have disclaimed jurisdiction in cases similar to that under consideration. On the contrary, in our opinion, they show that the federal courts not only recognize that they have such jurisdiction but have exercised it.

Point 2.

The jurisdiction of the state court over the liquidation and winding up of insurance companies is not exclusive and cannot effect the jurisdiction of the federal court.

In the court below it was contended by the petitioner that the state Insurance Code had not conferred exclusive jurisdiction on its state courts with regard to the liquidation and winding up of insurance companies. In answer to this, the Supreme Court of Pennsylvania in its opinion said:

> "We think the latter fact of little or no consequence for the reason that if the Federal Court has jurisdiction, its cognizance of the actions could not be ousted by a state statute declaring that its courts have exclusive jurisdiction." (R. 28.) *Commonwealth ex rel. v. Penn General Casualty Co., supra* at page 4.

In effect, however, the decision of the Supreme Court of Pennsylvania holds that the equity jurisdiction of federal courts based on diversity of citizenship is limited so as not to extend to so-called quasi public corporations which are incorporated and regulated by a system of state statutes.

This is tantamount to saying that a state may by its statutes limit the jurisdiction of federal courts.

In the absence of the pendency in the federal court of any proceeding involving the same issues and subject mat-

ter, the state court under the Act of May 17, 1921, P. L. 789, § 501 et seq. (40 P. S. § 201 et seq.) has jurisdiction to liquidate and wind up insolvent and unsound insurance companies. By the Insurance Code of Pennsylvania—as set forth in the Insurance Department Act of 1921, approved May 17, 1921, P. L. 789 (40 P. S. § 1 et seq.) and the Insurance Company Law of 1921, approved May 17, 1921, P. L. 682 (40 P. S. § 341 et seq.)—there has been provided a system for the incorporation, supervision and liquidation of insurance companies. However, the jurisdiction therein conferred upon the state courts with regard to the liquidation and winding up of insurance companies is not exclusive.

(1) *The Insurance Code does not give exclusive jurisdiction to the state court.*

There is no specific provision in the insurance laws giving the state court sole and exclusive jurisdiction for the appointment of receivers for insurance companies.

A reading of the Insurance Code does not justify even the inference that it was intended to provide the only method whereby an insurance company could be liquidated and its business wound up. The Insurance Department Act of 1921, *supra,* recognizes that receivers may be appointed for insurance companies by the several courts of the Commonwealth in suits instituted by private litigants. The provisions of said Act bearing on this point are as follows:

> "Section 507. *Insurance Commissioner to Supersede Other Receivers.*—Whenever a receiver of an insurance company, association, exchange, society, or order is appointed by any court of this Commonwealth, on motion of the Attorney General at the instance of the Insurance Commissioner, such receiver shall forthwith supersede any receiver previously appointed by

the decree of any court of this Commonwealth, and shall likewise supersede any assignee or trustee previously appointed by such insurance company, association, exchange, society, or order." (40 P. S. § 207.)

"Section 508. *Superseded Receivers, Et Cetera, To Deliver Over Property and File Accounts.*—Such superseded receiver, assignee, or trustee shall forthwith pay over and deliver all moneys, securities, assets, and property of such insurance company, association, exchange, society, or order in his or their custody, possession, or control to the receiver appointed as aforesaid on motion of the Attorney General, and shall likewise file his or their account in the court having jurisdiction of such superseded receiver, assignee, or trustee, which court shall allow credit for compensative counsel fees and expenses and for disbursements which shall have been properly earned, incurred, or made, prior to the appointment of the receiver made on motion of the Attorney General as aforesaid." (40 P. S. § 208.)

It is to be noted that Section 507 (40 P. S. § 207), above quoted, contemplates that a receivership of an insurance company may exist independent of the action to be taken by the Attorney General, as provided by Section 502 of said act (40 P. S. § 202), since provision is made therein for the Attorney General to move the court for the appointment of the Insurance Commissioner as receiver who shall forthwith supersede receivers otherwise previously appointed. And furthermore Section 508 (40 P. S. § 208), above quoted, specifically provides for the payment of counsel fees, expenses and disbursements incurred prior to appointment of the receiver on motion of the Attorney General. In fact there is nothing in said act which prevents a receiver appointed by a state court upon application of a private litigant from conducting said receivership to final conclusion, except the

institution of proceedings by the Attorney General under Section 507.

The above provision contemplates that all competent state courts shall have the power to appoint receivers and to administer the affairs of insurance companies at the instance of a private litigant.

It is evident, therefore, that the Insurance Code does not even attempt to provide that the sole and exclusive method of winding up an insurance company shall be that prescribed by Section 502 of the Insurance Department Act of 1921, *supra,* (40 P. S. § 202) wherein proceedings must be initiated by the Attorney General.

(2) *The Insurance Code cannot limit or affect the jurisdiction of the federal court.*

Although the Supreme Court of Pennsylvania in its opinion, above quoted, has recognized that a state statute cannot oust the jurisdiction of the federal court, the effect of this decision is to accomplish that which it admits could not have been expressly done by the legislature.

The jurisdiction of the federal courts cannot be limited either directly or indirectly by enactments of the state legislatures or by decisions of the state judiciary.

In *Chicot County v. Sherwood,* 148 U. S. 529, 534 (1893), this Court reaffirmed the principle that a state legislature cannot limit or curtail the jurisdiction of the federal courts, saying:

> "In Hyde v. Stone, 20 How. 170, 175, it is said: 'But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the

distribution of their judicial power. In many cases state laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the States, either by legislative enactment or by their own rules. *But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. Suydam v. Broadnax,* 14 Pet. 67; *Union Bank v. Jolly's Administrators,* 18 How. 503.' " (Italics ours.)

Farrell v. Stoddard, 1 F. (2d) 802, 804 (N. D. N. Y. 1924), is a case very much in point on this question. In the opinion, the following principle is set forth:

"But the defendant also asserts that the Legislature has provided a method for the liquidation of the business, assets, and affairs of insurance companies by the defendant, to which all claimants must confine themselves, and that plaintiff has not done so. *The statute in question does not assert that the method thus provided shall be exclusive as do certain other statutes of the state.* It is held on excellent authority that, where a remedy exists at common law and a remedial statute is directed at the same wrong, if such statute provides a larger or summary or more efficient remedy for the party aggrieved, but does not in terms or by necessary implication deprive the party injured of the remedy which existed at common law, the statutory remedy is considered as merely cumulative and the party injured may resort to either at his election. Rosin v. Lidgerwood Manufacturing Co., 89 App. Div. 245, 86 N. Y. S. 49; McGraw v. Gresser, 226 N. Y. 57, 123 N. E. 84. This doctrine applies also to rights existing under equitable rules. . . .

"Even if the statute had in so many words expressed the intent to supersede the existing equitable

and common-law rights, and to provide an exclusive method, it may well be doubted whether it would have any force or effect as to this plaintiff, a resident of Massachusetts, who is not subject to the jurisdiction of the laws of the state of New York as to his equitable or common-law rights, and has not sought the aid of the state courts. If the state of New Jersey may, by legislative act, change the rights or remedies of a citizen of Massachusetts, it may change the rights or remedies of citizens of any other state and of all the states, and its power would, to the extent of rights arising from property existing in or illegally transferred to the state of New York, be equal to that of Congress. Such contention could not be maintained. *In case of diversity of citizenship, one who elects to assert his equitable or common-law rights in a federal court cannot be deprived of them by the statutes of the state in which the federal court happens to exercise jurisdiction at the time.* Morrill v. American Reserve Bond Co. (C. C.) 151 F. 305; Chicot County v. Sherwood, 148 U. S. 529, 13 S. Ct. 695, 37 L. Ed. 546. A federal court may not abdicate its duty or authority in any case in favor of another jurisdiction. Kline v. Burke Construction Co., 260 U. S. 226, 234, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077." (Italics ours.)

See also *Straine v. Bradford*, 88 Fed. 571 (C. C. Vt. 1898).

Thus, the state legislature, in providing that the receiver appointed upon motion of the Attorney General shall supersede any receiver already appointed by another state court, has in effect centralized the procedure in state courts and practically set up a uniform *state* system for winding up insolvent insurance companies which, however, is not and was not intended to be exclusive so far as it might relate to the jurisdiction of the federal court.

The Pennsylvania Insurance Code does not confer jurisdiction but merely regulates the venue as between the various state courts of common pleas. It contains no provision which attempts to limit the jurisdiction of the federal court.

On the contrary, the system has been centralized to the extent that now, to all intents and purposes, there are only two effective ways available for the liquidation and winding up of insolvent and unsound insurance companies—proceedings in equity in the federal court or in the state court under the Insurance Department Act of 1921.

Point 3.

The jurisdiction of the federal and state courts being concurrent, the federal court first acquired jurisdiction and is therefore entitled to retain it to the exclusion of the state court.

(1) *The proceedings in the state court and in the federal court involve the same issues with regard to the same subject matter.*

The Statement of the Case (R. 5) shows that although the plaintiffs in each of the two proceedings are different parties, one of which proceeded by bill in equity and the other by a suggestion, the allegations in support of their respective suits are substantially the same, and the relief sought by each is likewise the same. Each party has alleged in its respective pleading that the petitioner has been mismanaged, its capital impaired, and that its condition is unsafe and unsound (R. 7, 8); and both the bill in equity and the suggestion pray for the appointment of a receiver, the winding up of the affairs of the petitioner, and the liquidation of its assets (R. 7, 8). In addition thereto, the sugges-

tion further prays for the vacation of the petitioner's charter and the dissolution of the company (R. 8).

(2) *The federal court first acquired jurisdiction, and is entitled to retain said jurisdiction to the exclusion of the state court.*

The federal court acquired jurisdiction of the subject matter in controversy on November 17, 1933, when Samuel Lando filed his bill in equity (R. 6). Not until December 8, 1933, twenty-one days thereafter, did the Attorney General file his suggestion in the state court (R. 8).

The rule with regard to the acquisition of jurisdiction as between two courts of concurrent jurisdiction and the priority acquired by one upon the filing of a bill in equity in a suit involving the same issues and regarding the same subject matter has been succinctly stated by the late Mr. Chief Justice Taft in *Harkin v. Brundage*, 276 U. S. 36, 43 (1928) as follows:

> "The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this Court. As between two courts of concurrent and coordinate jurisdiction, *the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference* and can not be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill, it is the date of the actual possession of the receiver that determines the priority of jurisdiction. Moran v. Sturges, 154 U. S. 256, 283, 284; Palmer v. Texas, 212 U. S. 118; Wabash Railroad v. Adelbert

College 208 U. S. 38, 54; Farmers' Loan and Trust Company v. Lake Street Railroad Company, 177 U. S. 51, 61; and Adams v. Mercantile Trust Company, 66 Fed. 617. The difficulty in the application of the rule is in determining whether the conflicting jurisdictions are actually concurrent and the same." (Italics ours.)

In *Palmer v. Texas*, 212 U. S. 118 (1909) this Court held that a state court, having first obtained jurisdiction of an oil company for the purpose of liquidating the same, was entitled to retain said jurisdiction to the exclusion of the local federal court in which a bill in equity had subsequently been filed for the same purpose.

This rule was likewise applied in the case of *O'Neil v. Welch, supra,* in which the federal court refused to exercise its jurisdiction because prior proceedings had already been begun in the state court. In that case the Court said on page 265:

> "When, therefore, we find which court first obtained jurisdiction of this controversy, we have answered the question as to which should retain it."

See also *Mitchell v. Maurer, supra; Commonwealth of Pennsylvania v. Williams, et al., supra;* and *Ward v. Foulkrod,* 264 Fed. 627 (C. C. A. 3d 1920).

An application of the aforesaid stipulated facts with regard to the filing of the bill in equity in the federal court and the suggestion in the state court to the aforesaid principle of law requires the conclusion that the jurisdiction to liquidate and wind up the affairs of the petitioner was first acquired by the federal court on November 17, 1933 when the aforesaid bill in equity was filed by Samuel Lando, and that pending the disposition of the said bill in equity, the state court was without jurisdiction to proceed in the case instituted therein by the Attorney General.

(3) *The jurisdiction of the federal court is unaffected by any procedings by the Insurance Commissioner prior to the filing of the suggestion by the Attorney General, or by any subsequent proceedings in the state court.*

The record further discloses that, following the receipt of information that the assets of the petitioner had been depleted, a hearing was held before the Insurance Commissioner on September 14, 1933, at which time the then president of the petitioner was ordered to return to the petitioner all the assets he had removed (R. 5). Pursuant to notice a formal hearing was held before the Attorney General on October 14, 1933 (R. 6). Thereafter the Insurance Commissioner conducted negotiations with shareholders of the petitioner for the purpose of possibly effecting a financial rehabilitation of the company (R. 6).

The statute under which the Insurance Commissioner was proceeding required him to communicate to the Attorney General the facts which would form the basis of the subsequent action by the Attorney General when he applied to the Court of Common Pleas of Dauphin County, or to the court of any county in which the principal office of the company is located, for an order to show cause why the business should not be closed. Act of May 17, 1921, P. L. 789, § 502 (40 P. S. § 202). Such acts, however, on the part of the Insurance Commissioner and Attorney General (prior to his application to the state court) do not confer jurisdiction upon the state court. The Insurance Commissioner is required to hold a hearing before he may seek the assistance of the court. Such hearing may establish that no reason exists for taking over a company. In such case the matter will never even come to the attention of the Court.

That the legislature thought it advisable for the Insurance Commissioner to take these preliminary steps before actual legal proceedings can be instituted is a matter peculiarly within the province of the legislature. But, as provident and wise as such preliminary measures may be in protecting the interests of the public and in the prevention of possible unjustified or hasty proceedings against insurance companies, jurisdiction does not attach until procedings have actually been instituted in the state court.

It is interesting to note that the Insurance Commissioner waited almost two months from the date of the hearing and almost a month after the filing of the bill in equity by Samuel Lando before he instituted legal proceedings. In no sense of the word can it be said that there was a race between the two courts or between various interested parties as to which court should liquidate the company.

A similar situation arose in the case of *Elson v. Mortgage Building & Loan Association*, 4 F. Supp. 779. There the Secretary of Banking held a meeting with the officers and directors of the association in June of 1931; then he waited until October 28, 1932, when he asked for a financial report; while on December 6, 1932, he advised the officers that the association was insolvent. However, on February 9, 1933, a bill in equity (similar to the bill in equity of Samuel Lando) was filed in the federal court by a non-resident shareholder. Thereafter, on February 14, 1933, the Secretary of Banking served notice on the officers of the association of a hearing to be held on February 17, 1933, after which the Secretary on the very same day filed his "Certificate of Possession" in the Court of Common Pleas of Philadelphia County.

In that case, the Court held that the federal court by the filing of the said bill in equity first acquired jurisdiction

and rightly refused to consider such preliminary meetings as being equivalent to the institution of legal proceedings. As stated by Judge Welsh on pages 783 and 784, such actions amounted at the most to nothing more than a mere monition. They "did not even rise to the dignity of a restraining order" which, when "issued by a state court, is not the equivalent to the commencement of an action for the appointment of a Receiver."

The fact that the state court proceeded to a final hearing in the instant case, and actually appointed a receiver, cannot deprive the federal court of jurisdiction which it had first acquired. Such proposition is untenable, for if the state court did not obtain jurisdiction upon the filing of the suggestion therein by the Attorney General, no subsequent proceeding on its part could supply it. *Harkin v. Brundage, supra.*

For the same reason, we submit that the fact that the state court in the instant case issued a restraining order one day before the federal court issued its restraining order in the suit by Samuel Lando (R. 9, 10) is immaterial so far as the question of determining which court acquired jurisdiction is concerned. In controversies of this nature, the issuing of injunction can neither deprive one court of jurisdiction which it has acquired nor confer such jurisdiction on another court, *Mitchell v. Maurer, supra.*

In the case of *O'Neil v. Welch, supra,* the federal court appointed a receiver who actually took possession of the assets of the insurance company. Such actions, however, were held to be of no avail, so far as the question of jurisdiction was concerned, and the assets of the insurance company were turned over to the receiver of the state court in which proceedings had first been instituted.

Likewise, in *Mitchell v. Maurer, supra,* the Circuit Court of Appeals for the Ninth Circuit held that the issuance of a restraining order and of an order for the State Insurance Commissioner to take into his possession, as receiver, the property of the insolvent company was immaterial, inasmuch as the federal court had already acquired jurisdiction by the filing of a petition therein prior to the institution of proceedings in the state court.

Therefore, the actions of the Insurance Commissioner prior to the filing of the suggestion in the state court, and the actions of the state court in issuing its restraining order and in entering the final decree appointing a liquidator were inconsequential so far as concern the determination of what court first secured jurisdiction of the petitioner. Such actions were ineffectual to give the state court jurisdiction to the exclusion of the federal court which had already acquired jurisdiction by the filing therein of the aforesaid bill in equity. The federal court is entitled to retain that jurisdiction until it has finally disposed of said proceeding.

We submit, therefore, that the federal court first acquired jurisdiction over the liquidation and winding up of the affairs of the petitioner, and is entitled to retain said jurisdiction to the exclusion of the state court.

CONCLUSION.

We, therefore, respectfully submit:

1. That the federal court has jurisdiction of a suit brought by a non-resident shareholder of an insurance corporation for the enforcement and adjustment of the rights and equities of the creditors and shareholders thereof through the administration of its property by a receiver duly appointed to wind up and liquidate the affairs of said corporation;

2. That the jurisdiction of the state court over the liquidation and winding up of an insurance company is not exclusive, and cannot limit the jurisdiction of the federal court;

3. That the jurisdiction of the federal and state courts being concurrent, the federal court first acquired jurisdiction and therefore is entitled to retain it to the exclusion of the state court;

4. That the Court of Common Pleas of Dauphin County had no jurisdiction to enter the final decree appointing a liquidator to take possession of the business and property of the petitioner; and

5. That the decree of the Supreme Court of Pennsylvania should be vacated, with costs here and in the Courts below.

Respectfully submitted,

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